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Current Topics.

Maritime Courts.

SINCE the article on "Allied and Colonial Forces in England" appeared in THE SOLICITORS' JOURNAL on 10th May (*ante*, p. 219), the Allied Powers (Maritime Courts) Bill has been introduced in the House of Commons and has now been passed. It authorises Allied Governments established in this country, which possess Mercantile Marines to set up their own Maritime Courts. These are to deal with the following offences against the law of the Power establishing the Maritime Court: (a) Offences committed by any person on board a merchant ship of that Power; (b) offences committed by the master or members of the crew of a merchant ship of that Power in contravention of the merchant shipping law of that Power; and (c) offences committed by a person who is a national of that Power, and a seafaring person, in contravention of the mercantile marine conscription law of that Power. The Maritime Courts are not to have jurisdiction over British subjects and there are ample safeguards against British subjects being brought before them. They are not to be authorised to try persons for offences for which they have been acquitted or convicted by a British Court and the jurisdiction of British Courts to try offences against British law is preserved. Process must be issued by a Justice of the Peace in order to bring a person before a Maritime Court. Only two forms of punishment are to be enforced against persons brought before Maritime Courts, detention and fine. Detention is to be in British prisons and treatment is to be assimilated to the British treatment on imprisonment or penal servitude. If any person claims that in any proceedings connected with the trial of any person convicted by a Maritime Court, or with the punishment of any person by such a court for contempt of court, the jurisdiction conferred by the Act has been exceeded he may, with the leave of the Maritime Court or of the High Court, apply to the High Court in accordance with rules of court for a declaration to that effect and then all proceedings connected with the trial or punishment of that person by the Maritime Court, except any decision by a local tribunal as to his nationality, is to be void. In the case of an application on the ground that the person affected was a British subject, leave to apply is not to be given unless the court holds that the question of his nationality has not been determined, and that it is by reason of some other cause than the neglect or default of that person.

Progress of the Bill.

IN moving the Second Reading on 13th May, Mr. Herbert Morrison asked that it should be expedited as it was concerned with a vital part of the Battle of the Atlantic. It put at the disposal of Allied Governments the machinery to maintain discipline in their ships and to deal with offences committed on those ships. Though the Bill was a constitutional novelty, he asked the House to accept it on the basis that it followed logically from the recognition of the sovereign power of the Allied Governments. In the course of the debate which followed, Mr. Shinwell contended that the mischief at which the Bill aimed was amply covered by Regulation 47a of the Defence (General) Regulations 1939, dealing with deserters from ships, etc. He argued that a prosecution by foreign owners or shipmasters before a foreign court might worsen the wages and conditions of foreign seamen, which in its turn would have a detrimental effect on the wages and conditions of work of British seamen, and said that there should be a maritime board for allied seamen to co-ordinate their wages and conditions of work with those imposed by the National Maritime Board. He hoped that proceedings would be in public, that British lawyers might defend accused persons and that sentences would be related to British criminal law. Mr. Goldie thought that offences committed on board an allied merchant ship might be dealt with by requesting Allied Governments to extend the jurisdiction of our own courts and referred to an Act which made all criminal offences committed by British seamen triable at the Central Criminal Court. (By s. 22 of the Central Criminal Court Act, 1834, offences committed on the high seas and other places within the jurisdiction of the Admiralty of England are triable at the Central Criminal Court.) He also thought that there should be proceedings in the nature of extradition before one of our own courts before the man is handed over to a foreign court. Mr. Mander thought that disputes about nationality should go to an Allied court of appeal. Mr. David Adams said that he was a very strong advocate of adequate appeal courts, owing to his experience of the mining industry, and urged that there should be an adequate court of appeal. After further debate the Solicitor-General (Sir William Jowitt, K.C.) replied and said that if the Bill was completely without precedent, so were the circumstances which required it. He added that the Bill met with the approval of both the Norwegian Government and the Norwegian Seamen's Union. On Committee stage being reached on 15th May, Mr. Peake, Under Secretary to the Home Office, moved an amendment to enable maritime courts to try offences which had already been committed in deliberate defiance of the laws of the Allied Governments. Eventually the amendment was carried, with a limit of six months before the passing of the Act for previous offences.

Fire Services (Reorganisation).

IN answer to a question in the House of Commons on 13th May, Mr. Herbert Morrison announced that the Regional technical staffs and the fire department of the Home Office had been strengthened. Regional and Central inspection staffs had carried the lessons of the raids from raided areas to all the other principal target areas. Regional conferences had been held to drive the lessons home. A shortage of man-power would be met by the National Service Act of April last. With intensified attack, Mr. Morrison said, a drastic change of organisation must be made, as a fundamental difficulty sprang from the fact that the fire service was a local service. On that ground the Government had decided to seek from Parliament powers to place the whole fire brigade resources of the country under the general control of the Secretary of State and the Secretary of State for Scotland, with a view to the re-grouping of the resources into larger units for the purposes of administration and control, and to constitute mobile fire-fighting units for reinforcing purposes or other special duties. Mr. Morrison added, in reply to a supplementary question, that the full utilisation of the water services of the country was a matter which would not be lost sight of, and it would be necessary to strengthen the Regional organisation as far as water was concerned. On 14th May the Fire Services (Emergency Provisions) Bill was introduced by the Home Secretary "to provide for the re-organisation and improvement of the fire services of Great Britain, and for purposes connected with the matters aforesaid." It proposes to empower the Secretary of State to make regulations providing for the co-ordination, for the period of the present emergency, of all or any of the fire services provided by local authorities, or for the unification, in whole or in part, of

all or of any of those services for that period, whether under his control or otherwise. The regulations may also provide for the alteration of a local authority's fire-fighting duties, the giving of directions by the Secretary of State to local authorities, the use of a local authority's fire-fighting appliances by the Crown or another authority, the transfer of fire-fighting personnel from one local authority to another or to the Crown (this does not apply to personnel employed part time or without remuneration) and a number of other necessary matters. The Bill passed speedily through all its stages as an emergency measure, and thus the fullest use will be made of the existing fire-fighting services at the earliest possible moment, and the necessary expansion of the equipment of the services will be effected.

A New Landlord and Tenant (War Damage) Bill.

THE Landlord and Tenant (War Damage) (Amendment) Bill was presented in the House of Commons by the Attorney-General and read the first time on 14th May. For an amending Bill it is lengthy and complicated, containing fourteen sections and a schedule, being twelve pages in all. The majority of its provisions are amendments of the principal Act consequent upon the passing of the War Damage Act, 1941, but there are a few other noteworthy matters dealt with in the Bill. Section 1 is a long section dealing with weekly tenancies. Its main object is to dispense with notices of disclaimer or retention in the case of weekly tenancies, and it provides that if and so long as any land let on a weekly tenancy is unfit by reason of war damage and is not occupied either in whole or in part by the tenant, no rent shall be payable under the tenancy. This, if passed, should be of material benefit to the poorer class of tenant who cannot be expected in every case to be aware of their rights with regard to notices of disclaimer and retention. The tenant may, while occupying the land or part of it during a period of unfitness, agree the rent with the landlord, or the court may fix it if no agreement can be reached. There is a similar provision for reduction of the rent if the premises are fit but the extent of the accommodation has been substantially diminished as a result of the war damage. There is a useful definition of "fitness" as applying to dwelling-houses let on weekly tenancies. Such a house is deemed to be fit if it has been repaired to such extent as is reasonably practicable at that time, having regard to the circumstances prevailing in the locality, and sufficient to render the dwelling-house reasonably capable of being used for housing purposes; the production of the sanitary inspector's certificate to this effect is to be sufficient evidence of the facts stated therein, unless the contrary is proved. Another important provision of the Act is contained in clause 9, which provides that the principal Act shall apply to ground leases in like manner as it applies to other leases, and accordingly sections 13 and 14, which modify the application of the Act to ground leases are to be repealed. Clause 10 provides that any express obligation to insure land against war damage is to be void and to be deemed always to have been void, and any obligation to insure land against fire or other risks is to be construed as not including, and as never having included, an obligation to insure against war damage. Nothing, of course, in the clause is to affect anything lawfully done before the passing of the Act in consequence of a failure to perform an obligation to insure against war damage. This should effectively dispose of the unfortunate results of the decision which Farwell, J. was bound to reach in *Moorgate Estates Ltd.* v. *Trower* (1940) 1 Ch. 206 that there was a breach of covenant to insure against certain war risks, although it became impossible from October, 1936, to obtain a policy to comply with the covenant. The Schedule contains a list of modifications of sections 6 and 15 of the principal Act, dealing with the determination of disputes as to unfitness of premises and with leases comprising two or more separate tenements, respectively. This further proposed increase to the already bulky war damage legislation, should, paradoxical though it may seem, tend to ease the burdens of legal advisers.

Militia Camps.

A COMPLETE vindication of the contractors, surveyors and others who are in official positions in connection with militia camps has been given in Mr. Justice Simonds's report (Cmd. 6271) on the allegations recently made to the Select Committee on National Expenditure. The Prime Minister requested Mr. Justice Simonds to inquire into the matter, and the latter has now stated that he has formed the clear opinion that it is not necessary to take any further action whether by sending the papers to the Director of Public Prosecutions or otherwise. Mr. Justice Simonds said that he was impressed, as no one who read all the departmental files could fail to be impressed, by the way in which, even in the exacting conditions of 1939 and 1940, allegations reflecting on the honesty of contractors and officials were taken up and probed. He recalled that when charges were repeated and pressed, Sir Cyril Entwistle, K.C., M.P., at the request of the Secretary of State for War, investigated and reported on one set of charges in November, 1939, and the Treasury Solicitor did the same in March, 1940. On both occasions the view of the War Office was confirmed. Having carefully considered the reports, Mr. Justice Simonds said that in his judgment they afforded a convincing exposure of the baselessness of the charges under review. He had himself examined a third set of charges which came from another source, and in the light of departmental inquiries and explanations he had come to the conclusion that the decision of the department to take no further action in respect to them was correct. While it is a good thing that there should be a close check on all public expenditure and even that a certain watchfulness against dishonesty should be constantly maintained, it is unfortunate that the bounds of discretion should occasionally be overrun by an excess of anxiety to give publicity to ill-founded suspicions. Mr. Justice Simonds's report will not merely restore complete confidence in the services into which his inquiry was directed, but should go far towards strengthening the trust that is reposed in all our public services.

The Metropolitan Police Report.

IN a recent report by the Chief Commissioner of the Metropolitan Police to the Home Secretary, the Chief Commissioner stated that while in 1939 the outbreak of war was followed by a reduction, in 1940 there was an increase in crime, as a result of the increase in air raids. It was difficult to imagine any crime, with the possible exception of manslaughter, in which what the Commissioner described as the "moral blame" could vary more widely than that of looting. Sentences had ranged from penal servitude to binding over, and the original outcry for heavy sentences in every case technically falling within the definition had died down as this had become more widely recognised. It was particularly distressing that many members of public services had abused what was in fact a position of trust. No doubt exemplary sentences would have a deterrent effect. Much could be done by appealing to the honour and esprit de corps of those serving under them. It cannot be disputed that an appeal to these not uncommon qualities can sometimes be effective, but such an appeal is soon forgotten, while the exposure to temptation is ever present. As for the deterrent effect of exemplary sentences, it has been proved over and again that exemplary sentences such as transportation, hanging, whipping and the treadmill have done little to reduce crime, while intelligent treatment of the causes of crime has done much. A constant reminder of the meanness of the offence of robbing persons who have lost their homes and businesses can be given by means of regular lectures, notices on bombed sites and other methods of instruction. The trustworthiness of persons employed in the civil defence services should be as proof against temptation as is that of bank officials and other servants who are entrusted with our property. By incorporating as part of the training of the civil defence services the inculcation of the importance of the public trust reposed in them, many persons will be really deterred from taking what may prove to be the first step in a life of crime.

Recent Decisions.

IN *In Re Thomas* on 15th May (*The Times*, 16th May), Simonds, J., held that a residuary bequest of property to the Silver Lady Fund, 6, Tudor Street, London, was a valid charitable gift. The Silver Lady Fund was founded and conducted by Miss Elizabeth Baxter to provide a travelling canteen and to give food and lodging to homeless people.

IN *Wood* v. *London County Council* (*The Times*, 13th May) the Court of Appeal (MacKinnon and Luxmoore, L.JJ., and Stable, J.) held that a kitchen at a mental hospital was not a factory within s. 157 (1) of the Factories Act, 1937 as held by Tucker, J., and that as the appellant had been guilty of contributory negligence her appeal failed. The appellant had been injured by an electrically operated mincing machine, which she alleged was not securely fenced.

IN *Roadways Transport Development Ltd.* v. *Attorney-General* on 13th May (*The Times*, 14th May) Farwell, J., held that a payment made to the possessors for the time being of a Bedford motor truck in respect of its requisitioning on 24th October, 1939, by or on behalf of the Army Council was not to be deemed a payment to the owners and that s. 113 (4) of the Army Act, 1939, did not apply, so that the Council was justified in not being concerned to see that the owner received the purchase money, but simply to pay the possessor for the time being. Section 113 (4) related to the requisitioning of vehicles for the moving of regimental baggage and the like, whereas s. 115 (4) related to the present case, because it dealt with payment to the owner for requisitioning during a period of emergency, which no one would deny existed in October, 1939.

IN *Watson* v. *Smith* on 13th May (*The Times*, 14th May), Bennett, J., granted the plaintiff an injunction to restrain the defendants, who were the general secretary and other officials of the Amalgamated Engineering Union, to restrain them from rejecting his nomination as a candidate for the office of executive councilman on the ground that he was not disqualified by the rule of the Union which required candidates to have worked at the industry or signed a vacant book and resided for the twelve months immediately preceding nomination. His lordship held that the twelve months referred only to residence and not to working. A declaration was accordingly granted, as well as the injunction, and 40s. damages and costs.

IN *Bradford Third Equitable Benefit Building Society* v. *Borders* on 9th May (*The Times*, 12th May), the House of Lords (Lord Maugham, Lord Russell of Killowen, Lord Wright, Lord Romer and Lord Porter) held, allowing an appeal from the Court of Appeal, that the essentials of an action of deceit had not been made out against the building society and there was no evidence associating the society with the fraud committed on Mrs. Borders.

Criminal Law and Practice.

COUNTS IN INDICTMENTS FOR SERIOUS CHARGES.

BEFORE the Defence (General) Regulations, 1939, r. 38A (dealing with looting), and the Treachery Act, 1940, the only capital offences were murder, treason (Treason Act, 1814, s. 1), certain kinds of piracy (Piracy Act, 1837, s. 2) and setting fire to the King's ships, arsenals, etc. (Dockyards, etc., Protection Act, 1772).

There is substantial authority to the effect that in cases of murder additional counts for other charges should not be added to the indictment. In *R.* v. *Jones* (1918), 13 Cr. App. Rep. 86, the indictment contained a count for murder and one for robbery with violence. A. T. Lawrence, J., said: "The Court thinks that in cases of murder the indictment ought not to contain counts of this kind. A trial for murder is too serious and complicated to have such counts inserted, and such was not the intention of the Indictments Act, 1915. The proper course is to have a second indictment in such a case and then, if the prisoner is acquitted of murder, or is convicted and the conviction quashed, he can be tried on the second indictment."

In *R.* v. *Large*, 83 SOL. J. 155; 27 Cr. App. Rep. 65, the Court of Criminal Appeal actually held that no other count ought to be included in an indictment for manslaughter, although it was not a capital offence. Humphreys, J., said that it had always been the practice in murder cases and was formerly the practice in manslaughter cases, and the Court repeated that it should be the practice in the future. The difficulty arising in that case owing to the multiplication of counts was that the learned judge, on receiving the jury's verdict of guilty on a count of manslaughter, told them that they need not proceed with a count under s. 1 (1) of the Children's Act, 1933, as the first count was "included in the second." The result was that the Court of Criminal Appeal had to resort to s. 5 (2) of the Criminal Appeal Act, 1907, which provided that the Court might in such a case, instead of allowing the appeal or dismissing it, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass a sentence warranted in law by the other offence, but not one of greater severity. If it had not been so obvious in that case that the jury were prepared to find the accused guilty of the lesser offence the Court could not have resorted to s. 5 (2) and the conviction would have had to be quashed.

The Court of Criminal Appeal has now laid down (*R.* v. *O'Grady*, 10th February, 1941, 28 Cr. App. Rep. 33) that "it is not a desirable practice, generally speaking, that a capital charge should be coupled with other non-capital charges in the same indictment." The appellant had been convicted on 17th December, 1940, of offences under the Treachery Act, 1940, the Official Secrets Act, 1911, and the Defence (General) Regulations, 1939, and sentenced to death.

There were nine counts in the indictment. There were three counts under s. 1 of the Treachery Act, 1940, four counts under regs. 1 (*d*), 2A (1), 2B 1 and 3 (1) (iii) of the Defence (General) Regulations, 1939, respectively, and two counts under the Official Secrets Act, 1911, s. (1) (*a*) and (*b*) respectively.

The Lord Chief Justice, giving the judgment of the Court, said that it was obvious from a mere perusal of the indictment and an attempt to state it intelligibly, that the combination of counts would not be very likely to lead to clarity of thought on the part of the jury, especially as an abstract of the indictment was not before them while the learned judge was summing up.

A further point of difficulty arising in *R.* v. *O'Grady* (above) was the question of "intent" within s. 1 of the Treachery Act, 1940. That section provides: "If, with intent to help the enemy, any person does, or attempts or conspires with any person to do any act which is designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life, he shall be guilty of felony, and shall on conviction suffer death."

The act which was alleged against the accused in one of the counts under s. 1 of the Treachery Act, 1940, was that of making a plan, which was likely to give assistance to the military operations of the enemy. Count 6 charged the same act of making a plan, contrary to s. 1 (1) (*b*) of the Official Secrets Act, 1911. That section provides, *inter alia*: "(1) If any person for any purpose prejudicial to the safety or interests of the State . . . (*b*) makes any sketch, plan, model or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy . . . he shall be guilty of felony. . . . "

At first sight it might appear to be correct to say, as the learned judge directed the jury in the Court below, that the count under the Official Secrets Act was "precisely the same" as that under the Treachery Act. The Court of Criminal Appeal held that this was not so, but "the jury should have been told that they might find that the plan was made for a purpose prejudicial to the interests of the State, and yet not find that the plan was made with intent to help the enemy." The Court held that there had been a misdirection, as the jury had been given to understand that a finding of guilty on one necessarily involved a finding of guilty on the other and, similarly, that an acquittal on one would necessitate an acquittal on the other.

A similar fault was found with the learned judge's direction with regard to the count under s. 1 of the Treachery Act, 1940, charging that the accused, with intent to help the enemy, cut a military telephone, which was likely to impede the military operations of His Majesty's Forces, and the count relating to the same Act under reg. 2B (1) of the Defence (General) Regulations, 1939. That regulation deals with "sabotage" and provides: "No person shall do any act with intent to impair the efficiency or impede the working or movement of any vessel, aircraft, vehicle, machinery, apparatus or other thing used or intended to be used in His Majesty's service or in the performance of essential services, or to impair the usefulness of any works, structures or premises used or intended to be used as aforesaid." The misdirection here consisted in giving the jury to understand that they were the same offences put in different ways.

The case is a cogent illustration of the difficult problems that may arise from coupling lesser charges with extremely serious charges in the same indictment. Although the Court has nowhere gone so far as to put the principle in this broad way, it is submitted that there is a clear inference that this can be done, having regard to the combined results of *R.* v. *O'Grady* and the previous cases of *R.* v. *Jones* and *R.* v. *Large* (above). In *R.* v. *O'Grady* the convictions under the Treachery Act were quashed and as the learned judge had pronounced no sentence in respect of the other counts, the Court pronounced a sentence of 14 years' penal servitude.

WHAT IS A SAUSAGE?

Section 3 of the Food and Drugs Act, 1938, provides that it is an offence to sell "to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser."

A tradesman was charged under this section at Grays on May 2nd for serving a customer, who asked for "½ lb. of his 9d. sausages," with an article which, on analysis, was found to contain no meat but a vegetable filling. There was contradictory evidence as to the way the sausages were marked in the window and the conversation between the shop assistant and the customer, but the Bench appeared to accept the prosecution's evidence that the only marking of the sausages was a ticket reading "9d. a lb." and that the customer was not informed, when making the purchase, that the sausages contained no meat.

The defendant contended that although the article of food described as a "sausage" commonly contained some quantity of meat of some description, it was not prejudicing a purchaser to sell under the description of "sausage" an article containing a vegetable filling instead of meat. The Bench rejected this argument and convicted, holding that a customer who asked for a sausage would expect to be sold an article containing meat.

The case is of some importance in view of the fact that owing to the meat shortage vegetable sausages are now being manufactured and sold on a considerable scale. Neither the prosecution nor the defence had been able to find any judicial or statutory definition of the word "sausage." In the First Schedule to the Public Health (Preservatives, etc., in Food) Regulations (S.R. & O. No. 775 of 1925), which contains a list of articles of food to which the addition of certain preservatives is permitted, there appears the item "sausages and sausage meat containing raw meat, cereals and condiments"; which perhaps suggests that there can be sausages not containing meat. On the other hand the Sausages (Maximum Prices) Order, 1941, while giving no definition, by its general language and use of the word sausage implies a connotation of meat.

A Conveyancer's Diary.

COVENANTS CONNECTED WITH RENTCHARGES

THE general rules as to the "running" of covenants, positive and negative, with corporeal hereditaments, are now fairly well understood; but what is the position where the hereditament, for whose benefit the covenant is taken, is not corporeal but incorporeal? In certain parts of the North of England there is a practice of selling land in return for a freehold rentcharge, and on occasion covenants may be taken from the purchaser with the motive of better securing the rentcharge. This practice is not, of course, confined exclusively to the North, but it far less common elsewhere and most of us have little practical experience of the problems involved.

A covenant is said to "run" with the land in two senses: either the benefit may pass to the successors in title to covenantee's land (then the benefit is said to run) or the burden may pass to the successors in title to the covenantor's land (then the burden is said to run). If the covenanting parties are in the relation of lessor and lessee both the benefit and the burden of a covenant run if the covenant "touches and concerns the thing demised." This rule is one of common law amended by the ancient statute 32 Hen. 8 c. 34, and is commonly known as the rule in *Spencer's Case* (5 Co. Rep. 17). It is not, of course, confined to negative covenants. Thus, a covenant to paint the interior woodwork of demised premises at the end of the term may be enforced in damages notwithstanding that the lessor and lessee at the end of the term are both assignees of the original lessor and lessee.

In leasehold cases both parties to the covenant (and the respective successors in title) necessarily have land, since each has an interest in the land demised: it is therefore easy enough to determine with what estates the benefit and burden are to run. But the freehold cases are not so easy, as the covenantee has not necessarily any land to support the covenant. Of course, if there is no such land,

there can be no question of the benefit "running," though no doubt the covenantee's personal representatives could sue the original covenantor. Assuming, however, that both parties to the covenant have land, the rules of law and equity are more complex. At *law*, there is no great difficulty. It is now clearly established that the burden of a covenant never runs with freeholds: *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750. It is equally clear that from very ancient days the benefit of such a covenant has run: *The Prior's Case* (1368), reported in the course of *Spencer's Case* (*supra*). Thus if A covenants with B to make up a road which is on A's land and gives access to B's land, B himself and B's successor in title can enforce the covenant against A, but neither of them can enforce it against A's successor in title. And no doubt if the covenant is framed as a warranty that the road will be kept up, A and his *personal representatives* can be sued by B or his successors in title. But A's successors in title are never liable at law. The well-known rule in *Tulk* v. *Moxbury*, 2 Ph. 774, has altered the position in equity so far, and so far only, as negative covenants are concerned. For positive covenants *The Prior's Case* and *Austerberry* v. *Oldham Corporation* are the beginning and end of the matter. There are a few cases which appear inconsistent with *Austerberry* v. *Oldham Corporation*, but they were all earlier and are thus either distinguished or overruled.

In equity the overriding principle is that of *L.C.C.* v. *Allen*, 1914, 3 K.B. 642; i.e., whenever else such covenants may be enforced against an assign of the covenantor, they are never so enforced unless (1) they are negative and (2) they are for the benefit and protection of land belonging to the original covenantee at the date of the covenant. All the other numerous and famous cases on the branch of jurisprudence known as the doctrine of restrictive covenants are either leading up to these two simple rules or are the working out of them in practice. Thus the essential is the possession by the covenantee of land which is benefited by the covenant, and this is so whether the benefit or the burden is to run and whether the covenant is positive or negative. What, then, is land? It is a term which strictly should include hereditaments incorporeal and well as corporeal. And in a sense the *Prior's Case* supports the view that an incorporeal hereditament is sufficient for this purpose, since the Prior's covenant was to sing in the chapel for the successive lords of the manor. But I do not think the matter can be dismissed with such facility. Very few people, judges and other lawyers included, really mean to include incorporeal hereditaments when they speak of "land," unless their minds are specifically directed to some point which turns on the wider meaning of the word, and it would be wrong to conclude, from the numerous references to "land" in this connection, that the benefit of covenants can run with incorporal hereditaments. Nor must anything be built on *The Prior's Case* for this purpose: a manor is, of course, an incorporeal hereditament, but it is only in these degenerate days that it has become conceivable in practice to have what I may call a "bare manor." Of course, in the Prior's day the lord of the manor owned a great deal of land in the neighbourhood in fee simple, and the benefit enured for the covenanting lord and his successors in the estate.

The matter has, however, been the subject of quite recent authority, at least so far as rentcharges are concerned, viz.: *Grant* v. *Edmondson* [1930], 2 Ch. 245, and [1931], 1 Ch. 1. The facts were these: in 1867 the then tenant for life of certain estates conveyed part of them to E in fee simple, acting under the powers given by a private Act. E. then granted thereout a rentcharge in fee simple limited on the same trusts in the settled land. He also made a covenant with the vendor, his heirs and assigns that he, the grantee, would pay the yearly rent. By divers mesne acts and events the plaintiffs had become entitled, as statutory owners, to the rentcharge. They were not, however, express assignees of the benefit of the original chargor's covenant. The defendants were now the trustees of the original chargor's will. In 1920 they had sold the land, subject to the rentcharge and to the covenants, to W. The latter went bankrupt and his trustee disclaimed the land in question, which was eventually vested in the plaintiffs. That no doubt made matters easy for the future; but the plaintiffs also wanted the arrears of the rentcharge which had accrued. As they obviously were not going to get anything out of W, they went (under the covenant) against the defendants as trustees of the estate of the original covenantor: the first defendant was incidentally also his personal representative. It was held both by Clauson, J., and the Court of Appeal that the plaintiffs could not succeed. The case mainly relied on was *Milnes* v. *Branch*, 5 M. & S. 322, where the assign of the original rentcharge failed to recover from the original rentchargor himself in an action on a covenant to pay the rentcharge and to build certain houses. I think that the law must now be treated as clearly settled: indeed, the only real reason why the case was capable of going so far as the Court of Appeal as lately as 1930 was that an unfortunate remark on the subject had been made by the great Lord Holt in *Brewster* v. *Kidgill*, 12 Mod. 166. This remark has now, with all necessary solemnity, been held to have been made *obiter*. Whether this state of the law is fortunate is quite another matter, and it is difficult not to sympathise with the rather ironically expressed judgment of Romer, L.J., who says (at p. 28) that "the established rules (on the subject of covenants running with land) are purely arbitrary, and the distinctions, for the most part, quite illogical." If in *Grant* v. *Edmondson* the land had been demised for a million years instead of being conveyed in fee simple, and the rent had thus been a rentservice and not a rentcharge, the plaintiffs would have succeeded, and similarly in *Milnes* v. *Branch*. There is no difference of substance between a term of an enormous number of years at a rent and a conveyance in fee at a rent, and the layman may well wonder why there should be such differences of accident.

I think that there is not much real doubt that *Grant* v. *Edmondson* and *Milnes* v. *Branch* would be treated as authorities for the proposition that the benefit of covenants between rentchargor and rentchargee cannot ever run with rentcharges. I do not think that the rule is confined to positive covenants, as there is no distinction, *quâ* devolution of benefit, between positive and negative covenants; but I should doubt whether negative covenants are of much practical importance in this connection.

I am told that questions sometimes present difficulties to practitioners in those parts of the country where the rentcharge system is strong. First, suppose a landowner has developed his estate with the sort of planned mutual restrictive covenants which constitute a building scheme, and has sold the plots in fee simple subject to rentcharge. He will, of course, make the purchasers enter into the restrictive covenants for the benefit of the estate as a whole and these will be enforceable mutually by the plot-owners under the building-scheme doctrine. They will also be enforceable by the vendor himself against the original covenantees, but not further or otherwise unless the vendor retains corporeal land capable of being benefited. The vendor will take further covenants with the motive of better securing the rentcharges—e.g., to build, repair, maintain, and so on. These certainly will not be enforceable by the vendor's successors as rentcharges in the absence of express assignment, though the effect of a chain of express assignments was left open in *Grant* v. *Edmondson*. I suppose one possible remedy would be to arrange that the vendor should be a corporation so that the question of assigns would not be so important.

The other question is the effect upon this class of covenants of redemption of the rentcharge under L.P.A., s. 191. The answer must now be pretty clear. Such covenants are enforceable as purely collateral covenants between the original contracting parties: accordingly, as between those parties it makes no difference in theory whether the rentcharge is still in *esse*, though there could hardly be any question but that, if the charge had been redeemed, the damages would be nil. As between later parties the covenants would not be enforceable anyhow, and the redemption would not affect the position.

In view of *Grant* v. *Edmondson*, S.L.A. s. 39 (4) (i), appears to be an error: it enacts that on a sale for a rentcharge of the settled land by a tenant for life the purchaser is to covenant to pay the rent. This seems a precaution of little value to the remainderman.

It has only been possible in the available space to sketch roughly the problems here involved, and I should be glad to revert later to this subject, especially if practitioners who are more familiar than I am with the actual working of the rentcharge system will be good enough to mention to me such practical difficulties as occur to them. In conclusion, I leave a problem for further reflection: What is the position if A charges Whiteacre in favour of B with a rent of £100 a year in fee simple and covenants to pay to B £100 each 1st January for ever, and by reason of non-payment for twelve years the rentcharge is barred? Is the covenant enforceable? The cases have shown that it is collateral, so presumably it should not fail with the rent, and a new cause of action would accrue each 1st January. Can it be that B can recover in covenant after the charge has ceased to exist?

Landlord and Tenant Notebook.

FITNESS FOR HUMAN HABITATION: THE STANDARD.

SECTION 2 of the Housing Act, 1936, imports into tenancy agreements of certain dwelling-houses "a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation." The houses in question are what were known as houses let for the occupation of the working-classes, and the statute re-enacts a provision which has been a regular feature of a long series of its predecessors. Nevertheless, we have had very little authority on the standard set by the words "in all respects reasonably fit for human habitation." In *Jones* v. *Geen* [1925] 1 K.B. 659, Salter, J., holding that the standard was much lower than that demanded by a covenant to keep in good and tenantable repair (fair wear and tear excepted) described it as "a humble standard," for the relevant statutes were "directed against slums, overcrowding and buildings in which people are herded together in conditions unsuitable for human habitation." As regards concrete instances, the same learned judge held, in *Stanton* v. *Southwick* [1920] 2 K.B. 642, that occasional raids by rats from a neighbouring sewer did not constitute a breach of the obligation, though it might be different if the noxious rodents "bred there, were regularly there and, as it were, formed part of the house." In a number of older cases it has not been seriously contended that a house could be reasonably fit for human habita-

tion if its ceilings collapsed. But *Morgan* v. *Liverpool Corporation* [1927] 2 K.B. 131 (C.A.), in which the disrepair relied on by the plaintiff tenant was the weak condition of a window sash-cord, showed us how very arguable the question of the standard set could be; and while that case was decided on another point—absence of notice to the landlords being held to be fatal to the claim, they being in the same position as a landlord who had entered into a covenant to repair—we have now a new authority, *Summers* v. *Salford City Council*, reported in *The Times* of 9th May last, in which it has been laid down by the Court of Appeal that a broken window sash does not in itself make a dwelling-house unfit within the meaning of the enactment.

Except for the fact that in the older case the opinions were expressed *obiter* and that the statute then in force provided no assistance in the shape of a provision in its interpretation section, the circumstances of both were to all intents similar: the tenant sustained injury when opening or cleaning the window. But what makes examination and comparison of the several judicial utterances so interesting is the varying degree of confidence they exhibit in the soundness of the opinions formed.

Thus in *Morgan* v. *Liverpool Corporation*, Lawrence, L.J., very tersely dismissed the proposition that the house concerned was in some respects unfit for human habitation as "somewhat fantastic"; it was his lordship's "emphatic" opinion that the defect in the window-sash did not render the dwelling-house unfit. Lord Hanworth, M.R., was less emphatic and stressed the qualification expressed by the word "reasonable" in arriving at the same conclusion. Atkin, L.J., who dissented, "felt bound to say" that the conclusion arrived at in the Court below "was not wrong." In *Summers* v. *Salford City Council*, MacKinnon, L.J., held that the house was not unfit after describing the problem provided by the legislature as a difficult one; Luxmoore, L.J., who dissented, does not appear to have felt very strongly about the matter; while the contents of Stable, J.'s judgment are not set out in the report at present available.

If we examine the reasoning of the various opinions and judgments, we find that that of Lawrence, L.J., is not at all concerned with the objects of the legislation: the point is decided by reference to the learned judge's interpretation of the language as it stands, "without any attempt to paraphrase or further define." (As already mentioned, the interpretation section then in force did not help.) Lord Hanworth devoted more of his judgment to the question of object, but the reasoning is not altogether easy to follow. "Although in order to make a house fit for habitation I think it is clear that it must have windows [this was, of course, before the days of intensified aerial warfare] and windows that open, it appears to me that the breaking of a window cord is an incident in the course of the habitation of a house which must be bound to occur . . . and in itself I cannot see that that incident afforded a proof or test that one could apply in determining whether the house was fit or unfit for human habitation." One feels, here, that nature and origin are unnecessarily introduced into the matter, which is one of standard.

It was Atkin, L.J., who dissented, who approached the problem in the light of the objects of the enactment and by reference to the mischief sought to be remedied, and who took into consideration, accordingly, "the class of house and the people with whom we are dealing in the particular circumstances of the case." The following passage indicates the line of reasoning: ". . . if a man is the owner of a house which has many windows and one window will not open easily, or open at all, that would be far from making the house in any respect unfit for human habitation. But what we are dealing with is a working-class house with two bedrooms . . . the question whether the only window in one of the two only bedrooms is capable of being opened with reasonable facility, and if not opened would have to remain shut, has a bearing upon the question whether that room is reasonably fit for human habitation."

Now if we can compare the available judgments in *Summers* v. *Salford City Council* with the *obiter dicta* in *Morgan* v. *Liverpool Corporation*, we find that MacKinnon, L.J., who described the words of the relevant section as "words of journalistic generality," approached the question from the same standpoint as had Lawrence, L.J.; but treading far more warily. In so far as the new statutory interpretation was in point, s. 188 (4) provides: "In determining for the purposes of this Act whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any bye-laws in operation . . . or of the general standard of housing accommodation for working classes in the district." MacKinnon, L.J., held that it was a case of disrepair or nothing: he could not think that the fracture of one sash-line could be said to be a sanitary defect.

It was on this point that Luxmoore, L.J., took a different view, and substantially, with the help of the interpretation, formed the same opinion as that voiced by Atkin, L.J., in the older case. The learned Lord Justice pointed out that sanitary defects included lack of ventilation; referring here, I think, though the present report does not mention it, to a definition in sub-s. (1) of s. 188: "'Sanitary defects' includes lack of air space or ventilation, darkness, dampness, etc." At all events, his lordship held that if a bedroom had only one window which could not be opened or shut without danger, that room might, in his opinion, be said to be unfit for human habitation.

The "without danger" does, I may observe in conclusion, provoke this thought: in neither of the two cases did the damage complained of have any direct connection with lack of ventilation. In each, the plaintiff was injured when attempting to manipulate the window, but the point might be taken that, as a consequence of the unfitness complained of, such injury is too remote.

Our County Court Letter.

THE HARVESTING OF SPROUTS.

In a recent case at Worcester County Court (*Hutton* v. *Morris*) the claim was for £77 18s. as damages for breach of contract. The plaintiff's case was that on the 3rd January he agreed to buy the defendant's field of sprouts (yielding an estimated crop of 500 pots) for £95. No time was mentioned by which the plaintiff was to be out of the field, and some of the sprouts were picked between the 4th January aud the 8th February. In that period 396½ pots were picked, and they realised £111 19s. The cost of picking reduced the net proceeds to £79 15s. 10d. About 100 more pots were left, and on the 15th February they appeared as if they would be ready in three weeks. Nevertheless, on the 4th March it was found that all but one acre had been pulled up by the defendant, who had fed the rest to sheep. The defendant's explanation was that he thought the plaintiff had finished with the field. From the 4th to the 10th March the ruling price was 14s. to 18s. per pot, and the plaintiff had lost 100 pots. Expert evidence was given that, from a sample obtained on the 4th March, the sprouts would have realised 17s. or 18s. The defendant's case was that he expected the sprouts to be all pulled by the end of February, by which time he wanted to pull the stems and plough for oats. On the 15th February there were only about ten pots left, and these were so widely dispersed, over a seven-acre field, as not to be worth picking. They were also damaged by snow and frost. Expert evidence was given that, if a crop of sprouts were sold on the 3rd January, a reasonable time for picking would be one month or six weeks. Frost or snow would not delay picking. His Honour Judge Roope Reeves, K.C., held that, in the absence of notice to the plaintiff, there was no implied condition that a reasonable time for picking would be one which would enable the defendant to go on his land and sow oats. The plaintiff, however, had only lost the value of twenty pots, and judgment was given in his favour for £15 8s. and costs.

RIGHT OF WAY.

In *Hindes and Others* v. *Ratledge*, recently heard at Northampton County Court, the claim was for damages and an injunction in respect of the obstruction of a right of way. The first plaintiff was the owner of two cottages, occupied by the second and third plaintiffs respectively. The property had been in the first plaintiff's family for seventy years, and was approached at the back from a lane by a passage. The latter had always been used without question as a means of reaching the lane from the cottages. In November, 1939, however, the defendant obstructed a gate, giving access to the passage from the plaintiffs' property, although she had never previously disputed the right of way. The conveyance to the first plaintiff's father was dated 1868, but did not specifically mention the right of way. The first plaintiff was aged seventy-two, and had always used the passage openly at all times of the day. The second plaintiff was aged sixty-five, and for thirty-six years she had used the passage without hindrance. Two other witnesses gave corroborative evidence. The defendant's case was that her brother had occupied the property at the rear of the plaintiffs' two cottages from 1925 to 1933. On one occasion—a Bank Holiday—she had found the door into the passage locked. The defendant became the owner of the property in 1937, and one of her tenants had made a complaint in 1939. The door into the passage-way was therefore fastened up. An ex-resident gave evidence that he had once nailed up the doorway to prevent his grand-child from running into the street and to keep beggars out. A builder gave evidence that he had had to obtain the key of the gate from the defendant in order to gain access to do repairs. It was submitted for the defendant that she was entitled to prevent unauthorised persons from using the passage as a short cut, and there was no evidence of user by the plaintiffs as of right. His Honour Judge Donald Hurst held that the plaintiffs had proved twenty years, if not forty years, uninterrupted use. Judgment was given in their favour for £2 damages, and an injunction was granted for the removal of the obstruction within seven days, with costs.

PROFESSIONAL ANNOUNCEMENTS.

To-day and Yesterday.

Legal Calendar

12 May.—On the 12th May, 1875, Nathaniel Lindley was called to the degree of Sergeant-at-law and appointed a Justice of the Common Pleas. After him no more serjeants were created in England.

13 May.—Silvester de Everdon received the Great Seal in 1244 and two years later resigned it on becoming Bishop of Carlisle. When he joined the combination of nobles against Henry III, the King denounced him as one "who so long licking the Chancery, wast the little clerk of my clerks." He died by accident on the 13th May, 1254.

14 May.—The Inner Temple Hall, now finally destroyed by fire bombs, was opened by Princess Louise on the 14th May, 1870. All the legal dignitaries were there and the Princess delivered a cordial message from "the Queen, my dear mother."

15 May.—On the 15th May, 1860, William Pullinger, the quiet, steady, middle-aged chief cashier of the Union Bank of London appeared at the Old Bailey charged with defrauding his employers of over £250,000. He had no extravagance but Stock Exchange gambling. The sentence was fourteen years' penal servitude.

16 May.—On the 16th May, 1836, Monsieur de Vandègre, a gentleman of Puy de Dôme, was tried at the Riom Assizes for the murder of his son, who had imprudently fallen in love with a servant girl and fled to her home. After going out one night he had been found shot. Though the neighbourhood believed the father guilty he was acquitted.

17 May.—On the 17th May, 1723, Christopher Laye, an ardent Jacobite and a barrister of Gray's Inn, was executed at Tyburn for high treason, dying bravely. He had been hatching a plot to seize the Hanoverian royal family and the public buildings in London and murder the ministers.

18 May.—Lord Blackburn was born on the 18th May, 1813. After many relatively briefless years as a law reporter, he was suddenly appointed a Justice of the Queen's Bench by Lord Chancellor Campbell. He was an extraordinary success as a judge and in 1876 he was raised to the House of Lords.

19 May.—On the 19th May, 1724, Jack Sheppard was arrested and locked up in St. Anne's Roundhouse, Soho.

20 May.—James Mathison, tried at the Old Bailey for forgery on the 20th May, 1779, lost his life because he lost his head. His speciality was counterfeiting Bank of England notes and these he reproduced so skilfully that even the cashier and the entering clerk could not positively discriminate between their true and their false signatures. The watermarks were so well done that even paper-makers were deceived. In this state of things he would certainly have been acquitted for lack of evidence had he not lost his confidence before Sir John Fielding, the magistrate who committed him for trial, and given ample information of his various frauds and his mode of carrying them into execution. He was accordingly convicted and sentenced to death.

21 May.—On the 21st May, 1545, Sir Robert Townesheud was appointed a Justice of Chester and he held that office till his death twelve years later. His father had been a Justice of the Common Pleas and he was called to the Bar at Lincoln's Inn. Its records reveal one comically human incident of his early life, for in 1518 he and several others were fined for playing cards and dice in chambers, one of the culprits being the parson. He became a Serjeant in 1540 and King's Serjeant in 1543.

22 May.—A strangely assorted pair were hanged at Tyburn on the 22nd May, 1732. "Edward Wentland alias Winkland for robbing Mr. Sanson of two half-guineas. He was sixty-six years of age and had served in all the famous battles both of the first and last war and denied the fact to the last; Thomas Beck for two street robberies, one on Mr. Wiseman of his hat and wig, the other on Mr. Davison of a silk handkerchief and cap. He declared he had been a pickpocket and thief from the age of six years. They both died penitent."

23 May.—On the 23rd May, 1701, Captain Kidd was hanged for piracy at Execution Dock in the sight of all the vessels using the port of London. He is one of the classical examples of policeman turned burglar. Till middle age he had maintained a high reputation, finally settling in New York and trading along the coasts of North America, then much infested by pirates. He had many schemes by which these pests could be dealt with and when at last the British Government took the matter seriously in hand, he was entrusted with the mission and given command of a small ship called the "Adventure." Among those who backed the scheme financially were Lord Orford, the First Lord of the Admiralty, and Lord Somers, the Lord Chancellor. They soon had cause to regret it, for, tempted by his opportunities and unable to control his unruly crew, Kidd turned pirate.

24 May.—Among the prisoners sentenced to death at the conclusion of the Old Bailey Sessions which ended on the 24th May, 1735, were William Hughes, a soldier, who had shot his mother in bed, and Elton Lewis who had murdered his aunt. Both had pleaded guilty, the former because a woman lodger in the same bed had seen the crime committed, and the latter because of the exertions of the magistrate who had examined him. "He continued five or six hours obstinate in denying it but was at length prevailed on by the pathetic admonitions of the Justice to make a full and free confession of the whole affair and to sign the same."

25 May.—On the 25th May, 1813, O'Connell in the Irish Court of Common Pleas moved for an order against the Rev. James Hamilton for illegal and oppressive conduct as a magistrate. A poor peasant girl had a hen which laid eggs strangely marked with red lines. These she brought into Roscrea, where the defendant was Protestant curate, and the curiosity aroused great interest, while her poverty awakened deep pity. A charitable weaver collected 15s. for her benefit but Mr. Hamilton, suspecting a superstitious imposture, sentenced her summarily to perpetual banishment from the town, decapitated the hen, broke the eggs and confiscated the money. He also committed the weaver "for having assisted in a foul imposition on public credulity contrary to good manners." The Court granted the rule applied for but Mr. Hamilton, terrified by the exposure, privately compromised the affair by paying compensation.

THE WEEK'S PERSONALITY.

Jack Sheppard's first effective arrest in May, 1724, marks the start of the really interesting part of his career, though he had not more than six months to live. As a thief this small active young Cockney had never operated on a very sensational scale since his first lapse from honesty about a year before, but as a prison-breaker he was now to earn a legendary immortality. Physically he was a pocket Hercules, agile and daring, and his apprenticeship had made him an astonishingly skilful carpenter and locksmith. He attributed his fall from grace to his association with a violent-tempered Amazon nicknamed "Edgworth Bess" whose insatiable demands had driven him to theft, and it was fitting that next day she joined him in gaol. Posing as man and wife, they were confined in the same cell in the fine New Prison at Clerkenwell. Within a week he had contrived their escape, sawing through their fetters, dislodging the window beam, contriving a way down from the top storey and over a 20-foot wall. All this achieved with a passenger was a fine performance. Two months of liberty were before him and this time he was arrested, tried and sentenced to death. With the help of Bess he escaped from the Condemned Hold. Recaptured ten days later he was confined in irons in the Castle at Newgate but on a dark night he broke out up the chimney, through several strong doors on to the roof and thence to freedom. A fortnight later he was caught and in due course hanged.

Obituary.

MR. A. S. CARDEW.

Mr. Arthur Schuyler Cardew, solicitor, and senior partner in the firm of Messrs. Joynson-Hicks & Co., solicitors, of Norfolk Street, Strand, W.C.2, died in May, as the result of enemy action, at the age of sixty-seven. Mr. Cardew was admitted a solicitor in 1896.

MR. T. OUTEN.

Mr. Thomas Outen, solicitor, of Messrs. Ashurst, Morris, Crisp and Co., solicitors, 17, Throgmorton Avenue, E.C.2, died on Monday, 12th May, at the age of sixty-six. Mr. Outen was admitted a solicitor in 1917.

Books Received.

Loose-Leaf War Legislation. Edited by John Burke, Barrister-at-Law. 1940-41. Part 10. London: Hamish Hamilton (Law Books), Ltd.

The War Damage Act, 1941. Explanatory synopsis of the compulsory property compensation scheme. By T. Simpson Pedler, M.A., LL.B., of Gray's Inn, Barrister-at-Law. London: The National Federation of Property Owners. Price 7½d., post free.

Parliamentary News.

The following Bills received the Royal Assent on the 22nd May:—
Public and Other Schools (War Conditions).
Allied Powers (Maritime Courts).
Fire Service (Emergency Provisions).

NOTICE TO SUBSCRIBERS.

Binding. The publishers cannot for the moment undertake the binding of issues. An announcement will be included in a later issue of THE SOLICITORS' JOURNAL as soon as it is found possible to undertake this work.

Reading Cases. These are temporarily out-of-stock but further supplies will be available very shortly.

Back Numbers. All numbers earlier than 20th April, 1941, are now out-of-print.